

NTSB Order No. EA-5245

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 18<sup>th</sup> day of August, 2006

Respondent.

### OPINION AND ORDER

Respondent appeals from the oral initial decision of Administrative Law Judge William R. Mullins, issued on April 26, 2005, following an evidentiary hearing.<sup>1</sup> By that decision, the law judge affirmed the Administrator's order of suspension, in part, finding that respondent had violated sections 91.13(a) and 91.126 of the Federal Aviation Regulations (FAR).<sup>2</sup> He also

<sup>2</sup> Section 91.126 states, in part, that when approaching to  
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dismissed the alleged violations of FAR sections 91.119(b) and 91.303.<sup>3</sup> The law judge modified the sanction by reducing the proposed suspension of respondent's Airline Transport Pilot (ATP) certificate from 270 to 30 days.<sup>4</sup> For reasons discussed below, we grant respondent's appeal.

The only issue on appeal pertains to the Administrator's allegation that, on August 6, 2003, respondent acted as pilot-in-command of an Interavia Model I3, N222XS, on a flight that departed from and returned to the Chetek Municipal Airport in Chetek, Wisconsin and made unauthorized right hand turns during his approach to land.<sup>5</sup>

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land at an airport without an operating control tower in Class G airspace, each pilot of an airplane must make all turns of that airplane to the left unless the airport displays approved light signals or visible markings indicating that turns should be made to the right in which case the pilot must make all turns to the right. 14 C.F.R. § 91.126.

Section 91.13(a) prohibits careless or reckless operations so as to endanger the life or property of another. 14 C.F.R. § 91.13(a). Under Board precedent, such a violation can be "residual" or "derivative," and need not be separately proven where an operational violation is sustained. See, e.g., Administrator v. Pritchett, NTSB Order No. EA-3271 (1991) at n.17, and cases cited there.

<sup>3</sup> Section 91.119(b) prohibits a person from operating an aircraft, except when necessary for takeoff or landing, at an altitude of less than 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft over a congested area of a city, town, or settlement or over any open air assembly of persons. 14 C.F.R. § 91.119(b). Section 91.303 sets forth the permissible parameters of aerobatic flight. 14 C.F.R. § 91.303.

<sup>4</sup> The Administrator did not appeal the initial decision. Respondent filed a brief on appeal, to which the Administrator failed to respond.

<sup>5</sup> Paragraphs 6, 8, and 9 (the relevant portions) of the  
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At the hearing, it was established that respondent owned two aerobatic aircraft: a two-toned, primarily bright green Interavia,<sup>6</sup> and a black YAK 52. See, e.g., Transcript (Tr.) at 17, 19, 24, 65, 126, 140, 147, 152, 179-80, 228. The Interavia is a fixed gear tail wheel aircraft with extra long landing gear. Tr. at 25, 65, 217.

The Administrator introduced into evidence a videotape that purportedly supports the charges in paragraphs 6, 8, and 9 of the complaint.<sup>7</sup> Exhibit (Ex.) A-2; see footnote 5, supra. Witness

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Administrator's complaint state:

6. On August 6, 2003, you were pilot in command of a civil aircraft, an Interavia Model I3 registered as N222XS on a flight that departed from and returned to the Chetek Municipal Airport in Chetek, Wisconsin.

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8. When landing your aircraft ... at Chetek Municipal Airport, you approached the airport and made a right hand turn to the runway.
9. Chetek Municipal Airport is an airport without an operating control tower within Class G airspace and did not display approved light signals or visible markings indicating that turns should be made to the right.

<sup>6</sup> The testimony and evidence revealed that the aircraft is also referred to as an Interavia SP-95 and a Sukhoi.

<sup>7</sup> The law judge admitted the videotape into evidence, over respondent's objection. Respondent objected, claiming that the Administrator failed to furnish him with a copy of the tape during discovery and that, consequently, he was unfairly surprised at hearing by the introduction of the tape. The Administrator responded that the tape, in fact, was sent to respondent's prior attorney, in response to a request made under the Freedom of Information Act (FOIA). Respondent asserted that the tape played at the hearing was not the same tape provided to his attorney by the Administrator.

On appeal, respondent argues that the Administrator failed to comply with the law judge's pre-trial order and that the

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Todd Kirkman stated that he and another individual made the videotape. Tr. at 101. As the tape was played, Mr. Kirkman testified:

We have an aircraft coming in to land at Chetek here, landing to the right hand turn. That's landing on three-five. That's a take-off, same airplane. Same day. That's just showing another airplane that was in the vicinity at the time when that happened. Now this is a different airplane, I believe it's the same day.

Tr. at 103. He then stated that the first aircraft on the tape was a YAK 52, and the second one was an Interavia. Id. Finally, the witness said he saw the Interavia take off and land that day, from east to west, on a straight-in approach. Tr. at 104.

Respondent testified that he did not operate the Interavia on August 6<sup>th</sup> as alleged by the Administrator and that, further, he could not have been operating the Interavia, as the aircraft's propeller had been removed for repair prior to that date. To support his assertion, he introduced a logbook entry entitled "Installation History" that appeared to indicate that the propeller was removed on July 31, 2003, and replaced on August 24, 2003.

The law judge concluded that the videotape and the testimony of Mr. Kirkman supported the Administrator's allegations and determined that they were more probative than the testimony of respondent and the propeller installation history. He

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failure resulted in severe prejudice to his defense. Given our disposition of the appeal, however, we need not decide this issue. Nonetheless, we note that, ultimately, the tape was beneficial to respondent, not prejudicial.

specifically found that the videotape showed the Interavia "making right hand patterns, right hand traffic at that airport..." Initial Decision at 252. Based on this finding, the law judge concluded that the Administrator had established the regulatory violation of section 91.126 and the residual violation of section 91.13(a). Id. at 261.

On appeal, respondent argues that neither the videotape nor the testimony establishes that respondent operated the Interavia contrary to the FARs, as alleged and, thus, the evidence does not support the law judge's conclusion.

After careful review of the record, including the videotape of the alleged occurrence, we cannot agree with the law judge's finding. Specifically, the Administrator did not show by preponderant evidence that respondent operated the Interavia on August 6, 2003, executing a series of right hand turns on approach to Chetek Municipal Airport, as alleged in the complaint. The videotape contains no footage of the Interavia landing after making right hand turns. Ex. A-2. It begins with a shaky camera trained on a distant aircraft that appears to be making a right turn, then landing. As the aircraft comes closer to the camera, it becomes clear that it is *not* a bright green Interavia. It is a dark colored aircraft and that aircraft, in the next shot, takes off from the same runway. As it takes off, the landing gear retracts. This coincides with Mr. Kirkman's narrative that an aircraft lands after a right turn, and then the

same aircraft takes off.<sup>8</sup> Tr. at 103. Id.

The next shot on the tape consists of a few seconds of an unidentified aircraft in the distance; then the camera trains on an aircraft fitting the description of the green Interavia. It is shown taking off, then turning right. The next shot is the same aircraft, filmed while on short final, landing straight onto the runway. There is no footage of this aircraft making right turns on approach.<sup>9</sup>

As previously mentioned, the law judge found that the tape showed the Interavia "making right hand patterns." Initial Decision at 252. The evidence presented at the hearing does not support this critical finding. At most, the testimony and video evidence showed a right turn-out departure, and, separately, Mr. Kirkman testified that respondent performed a "straight in" approach. While perhaps improper, the relevant charge related to the Interavia and stated that, "[w]hen landing your aircraft ... at Chetek Municipal Airport, you approached the airport and made a right hand turn to the runway."

Thus, on review of the entire record, we find that the

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<sup>8</sup> This aircraft fits the description of the YAK 52, not the Interavia. Mr. Kirkman testified that the first aircraft seen on the tape was the YAK 52. While it is entirely possible that respondent (or someone else) operated his YAK 52 in the right turn on approach to landing depicted on the videotape, that is not what the Administrator charged in the complaint and, thus, cannot be used to support the violation charged.

<sup>9</sup> Again, this is consistent with Mr. Kirkman's narrative. He stated that the tape showed another aircraft in the vicinity, then showed a different airplane on the same day. Id. He described seeing the Interavia take off and land that day, from  
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Administrator did not prove the facts necessary to support the FAR section 91.13(a) and section 91.126 charges by a preponderance of the evidence.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is granted;
2. The law judge's decision on the FAR section 91.13(a) and section 91.126 charges is reversed; and
3. The Administrator's order is dismissed.

ROSENKER, Chairman, and HERSMAN and HIGGINS, Members of the Board, concurred in the above opinion and order.

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east to west, on a straight-in approach. Tr. at 104.